SHAN & GOOI

v.

CAPITAL INSURANCE BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
VAZEER ALAM MYDIN MEERA JC
[CIVIL SUIT NO: MT1-22-467-2005]
23 MAY 2011

CONTRACT: *Indemnity - Contract of insurance - Claims - Discovery of unauthorised transfer of money - Claim against legal firm by aggrieved clients*

INSURANCE: *Contract of insurance - Claims - Discovery of unauthorised transfer of money - Claim against legal firm by aggrieved clients - 'Claims made' policy - Essence of 'claims made' policy - Whether third defendant estopped from setting up defence of non-notification in writing - Oral notification given by insured - Whether sufficient or must be in writing - Whether there was breach of contract*

The plaintiff, a law firm, had obtained mandatory insurance cover under the Malaysian Bar Professional Indemnity Insurance ('PII') from the first and third defendants for different periods namely 1999 ('1999 Policy'), 2001 ('2001 Policy') and 2002 ('2002 Policy'). When unauthorised transfers and withdrawals of monies were discovered to have taken place within the firm, the plaintiff's clerk was suspected to be the perpetrator of the fraud. Seeking advice on potential claims against the plaintiff arising from the said discovery, the plaintiff contacted Messrs Cunningham Toplis (M) Sdn Bhd ('Cunningham'), the third defendant's loss adjuster and scheme manager to whom under the 1999 Policy notification ought to be made on claims or circumstances giving rise to a claim. Cunningham then forwarded to the plaintiff *via* facsimile transmission the claims notification guidelines and the plaintiff was advised to make the necessary notification when actual claim was made against the plaintiff by the clients whose money had been misappropriated. The plaintiff did not take any further action on the 1999 Policy until sometime in June 2002 when two of their clients sued the plaintiff in respect of the misappropriation. In the meantime, upon the expiry of the 2001 Policy, the first defendant had become the insurer of the PII and the 2002 Policy was issued to the plaintiff. In the insurance proposal form issued by the first defendant for the 2002 Policy, the plaintiff had replied in the

affirmative to the question whether the plaintiff was aware of any occurrence or circumstances which may reasonably be expected to give rise to a claim against them. The plaintiff had, in the said insurance proposal form, given details of three possible claims arising from the fraud perpetrated in 1999. Sometime in 2002, several clients whose money had been fraudulently misappropriated in 1999 filed two separate civil suits against the plaintiff. Under the terms of the 2002 Policy, which was then in force, the plaintiff then wrote to the first defendant's loss adjuster and scheme manager, Messrs Crawford & Company ('Crawford') enclosing a copy of the first of the two writs. Writing on behalf of the first defendant, Crawford repudiated liability and advised the plaintiff to seek indemnity from the third defendant under the 1999 Policy. The plaintiff then went on to make a claim to the third defendant under the 1999 Policy by writing to Cunningham and enclosing copies of the two writs but there was no reply. After several reminders and a delay of nearly ten months, Cunningham wrote to inform the plaintiff that they were still awaiting instructions from their underwriters in London in respect of the claim. The plaintiff then proceeded to defend the two civil suits but the court entered judgment against it. The plaintiff claimed indemnity against the first and/or third defendants in respect of the judgment. The issues to be determined were (i) whether the PII scheme was a 'claims made' policy and if so, what in essence was a 'claims made' policy; (ii) whether by its conduct the third defendant was estopped from setting up the defence of non-notification in writing; (iii) whether oral notification given by the plaintiff was sufficient or must it be in writing; and (iv) whether first defendant was excluded from liability.

Held (awarding plaintiff general damages for 3rd defendant's breach of contract):

(1) The PII policy was a 'claims made policy'. The essence of a 'claims made' policy was that it provided cover for a claim first brought against the assured during the policy year. As is common with such policies, however, it extends cover to claims first brought against the assured privilege enjoyed by the firm as opposed to its client. (paras 15 & 20)

(2) The oral notification was valid. The third defendant admitted that the plaintiff had given oral notification of the claim in 1999. However, it was submitted that cl. 5.2 clearly provided that notice under cls. 5.1.1 and 5.1.2 shall be in writing. Since

notice was a condition precedent to the liability of an insurer, the condition had to be strictly complied with by the insured before the insured was entitled to bring a claim on the policy. Even if the plaintiff's oral notification of potential claim to Cunningham was valid under cl. 5.1.2, then the plaintiff's notification of actual claim in 2002 under cl. 5.1.1 would crystallise the claim and it is this second notice that had set off the then existing policy to be at risk. It was therefore abundantly clear that the requirement of notice under cls. 5.1.1 or 5.1.2 was a condition precedent for a 'claims made' policy for it was the relevant notice that would trigger off the policy at risk. (paras 20 & 22)

(3) Mere breaches of the terms and conditions of the policy other than non-payment of premium and subject to cls. 5.3 and 5.10, cannot be relied on by the insurer, and in this case the first and/or third defendants, to avoid liability. Therefore, the third defendant cannot avoid liability by merely claiming that the oral notification in 1999 was a breach of cl. 5.2. Even if the breach or non-compliance had resulted in material prejudice to the investigation and/or defence of any claim, the third defendant cannot avoid liability altogether but merely seek to reduce the amount of damages payable. (para 24)

(4) The oral notification given in 1999 had not caused any prejudice to the third defendant. It was incumbent upon the third defendant to prove by evidence that as a result of the misconduct on the part of the plaintiff, material prejudice to the investigation had been occasioned by the oral notification. However, the third defendant did not adduce any evidence in this regard. (para 25)

(5) Notice is a procedural step, the object of which is to alert insurers to investigate the claim before the trail becomes cold. This was not the case here. The third defendant had ample opportunity to investigate the claim to ascertain if it was a false or fraudulent claim. In any event, the third defendant had not raised the issue of breach of cl. 5.2 in any of the correspondence with the plaintiff. The third defendant had not previously raised this issue at all nor repudiated the claim. Nor had it notified the plaintiff whether the claim is accepted or rejected. (para 26)

[Order accordingly.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 SC ***(refd)***

HLB Kidsons & Ors v. Lloyd's Underwriters [2009] 1 Lloyd's LR 8 ***(refd)***

Quinn Direct Insurance Ltd v. Law Society of England and Wales [2010] EWCA Civ 805 ***(refd)***

Jupiter Securities Sdn Bhd v. American Home Assurance Company [2008] 9 CLJ 131 HC ***(refd)***

Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal [2010] 4 CLJ 770 CA ***(dist)***

Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors [2004] 8 CLJ 538 HC ***(refd)***

For the plaintiff - Gooi Hock Seng; M/s Athimulan & Co
For the 1st defendant - Iruthaya Raj; M/s Raj Selva & Co
For the 3rd defendant - Yeoh Cho Kheong; M/s Ranjit Singh & Yeoh

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The plaintiff is a law firm. At the material time, the partners of the plaintiff firm were Mr Gooi Hock Seng (''Mr Gooi'') and the late Mr N Shanmugam (''Mr Shan''). The plaintiff had obtained mandatory insurance cover under the Malaysian Bar Professional Indemnity Insurance (PII) from the 1st and 3rd defendants for different periods pursuant to the following insurance certificates:

(a) Certificate of Insurance No. MT 99-01374 (Master Policy No: DPI-43900362-01) for the period 1 July 1999 to 31 December 2000 issued by the 3rd defendant (''1999 policy'');

(b) Certificate of Insurance No. 2001/MY/2429 (Master Policy No: DPI-43900457-05) for the period 1 January 2001 to 31 December 2001 issued by the 3rd defendant (''2001 policy'');

(c) Certificate of Insurance No. 2002/MY/2429 (Master Policy No: DO2BRAPRF000001) for the period 1 January 2002 to 31 December 2002 issued by the 1st defendant (''2002 policy'').

[2] The late Mr Shan had sometime on 13 August 1999 discovered an unauthorized transfer of money from the plaintiff's clients' account to the plaintiff's office accounts. The following

day, the late Mr Shan further discovered that there were unauthorized withdrawals of monies from the plaintiff's office accounts. Mr Shan then immediately conveyed the discovery of these unauthorized fraudulent transfers to Mr Gooi. Both partners suspected the perpetrator of the fraud to be the plaintiff's clerk one Tan Cheow Lian. A police report was then lodged on 14 August 1999.

[3] On 18 August 1999, Mr Gooi orally by phone informed Messrs Cunningham Toplis (M) Sdn Bhd ("Cunningham") regarding the said discovery and asked for advice on potential claims against the plaintiff arising from the said discovery. Cunningham was the 3rd defendant's loss adjuster and scheme manager to whom under the 1999 policy notification ought to be made on claims or circumstances giving rise to a claim. Following Mr Gooi's oral notification, Cunningham had on 20 August 1999 forwarded to the plaintiff via facsimile transmission the claims notification guidelines (bundle B, p. 23). Mr Gooi states in evidence that he was advised by Cunningham to make the necessary notification when actual claim is made against the plaintiff by the clients whose money had been misappropriated. The plaintiff did not take any further action *vis-a-vis* the 1999 policy until sometime in June 2002 when two of their clients sued the plaintiffs in respect of the misappropriation.

[4] In the meantime, upon the expiry of the 2001 policy, the 1st defendant had become the insurer of the PII and the 2002 policy was issued to the plaintiff. In the insurance proposal form issued by the 1st defendant for the 2002 policy (bundle B, pp. 14-15) the plaintiff had replied in the affirmative to the question whether the plaintiff was aware of any occurrence or circumstances which may reasonably be expected to give rise to a claim against them, any predecessor or any principal, consultant, or professional assistant in or of the plaintiff's practice. The plaintiff had in the said insurance proposal form given details of three possible claims arising from the fraud perpetrated in 1999 by the plaintiff's clerk in the followings terms:

> We anticipate the following claims against the partnership:
>
> (a) RM275,625.00 from Mr S. Vijayasundaram - Administrator of the *Estate of v. Govindasamy Pillay (Deceased)* being the balance of the proceed of sales of land belonging to the Estate received by us and kept in Fixed Deposit which was transferred by our previous clerk without our consent and knowledge to our current account and misappropriated the same by forging our cheques.

(b) RM162,000.00 from Tan Chong Teik - being balance of the purchase price deposited with us which was also misappropriated by the said clerk by forging our cheques.

(c) RM470,000.00 from Mr P'ng Hun Sun - being money deposited with us to be paid to Mr P'ng upon clearance by the Income Tax Department which was also misappropriated by the said clerk by forging our cheques.

We discovered the above misconduct of our clerk on the 13th of August 1999 and a police report was lodged on the 14th August 1999.

[5] Sometime in 2002, several clients whose money had been fraudulently misappropriated in 1999 by the plaintiff's clerk had filed two separate civil suits against the plaintiff at the Penang High Court, namely Civil Suit No. 22-145-2002 and Civil Suit No. 22-459-2002. Both were essentially monetary claims.

[6] The plaintiff then under the terms of the 2002 policy, which was then in force, wrote to the 1st defendant's loss adjuster and scheme manager, Messrs Crawford & Company ("Crawford") on 28 June 2002 enclosing a copy of the first of the two writs filed in the Penang High Court namely Civil Suit No. 22-145-2002 (bundle B, p. 22).

[7] Crawford on 11 October 2002 writing on behalf of the 1st defendant repudiated liability and advised the plaintiff to seek indemnity from the 3rd defendant under the 1999 policy (bundle B, pp. 25-26) as the claim first arose during the pendency of the 1999 policy.

[8] Plaintiff then on 18 October 2002 made a claim to the 3rd defendant (bundle B, p. 37) under the 1999 policy by writing to Cunningham and enclosing copies of the two writs. There was no reply from Cunningham. After several reminders and a delay of nearly ten months, on 1 August 2003 Cunningham wrote to inform the plaintiff (bundle B, p. 41) that they were still awaiting instructions from their underwriters in London in respect of the claim.

[9] Thereafter, there was another period of silence from Cunningham. The plaintiff again wrote to Cunningham on 23 November 2003 asking for an immediate reply on the status of the plaintiff's claim. Neither the 3rd defendant nor Cunningham replied to the plaintiff right through to the filing of this action on 11 August 2005, nor has the plaintiff received any official repudiation of liability by the 3rd defendant under the 1999 policy.

[10] The plaintiff then proceeded to defend the two civil suits. However, on 4 March 2010 the Penang High Court entered judgment against the plaintiff in Civil Suit No. 22-145-2002. As at trial of this action, Civil Suit No. 22- 459-2002 was still pending disposal. The plaintiff claims indemnity against the 1st and/or 3rd defendants in respect of the judgment in Civil Suit No. 22-145-2002 with damages to be assessed and an order that the 1st and/or 3rd defendants indemnify the plaintiff in respect of the claim in Civil Suit No. 22-459-2002 with damages to be assessed.

[11] The 1st defendant's defence is that:

(a) the 1st defendant only provided cover for the period from 1 January 2002 to 31 December 2002 and that the 1st defendant was not liable in respect of the loss as the 1st defendant was not the insurer at risk at the time of the alleged loss in 1999;

(b) the plaintiff was in breach of cl. 5.1.2 of the certificate as it failed to give notice of the event or circumstance of which the plaintiff was aware in 1999 and which led to the filing of the civil suits against the plaintiff. The 1st defendant therefore repudiated liability; and

(c) the plaintiff has failed to prove loss.

[12] The 3rd defendant met the plaintiff's pleaded case as follows:

(a) the plaintiff had in August 1999 informed the 1st defendant and/or Cunningham orally regarding a possible claim. However, that oral notification did not and does not constitute a notification or claim made as envisaged under the certificate of insurance issued for the period 1 July 1999 to 31 December 2000;

(b) with regards to the plaintiff's reference of the said claims to the 3rd defendant in writing on 18 October 2002, the 3rd defendant is not obliged to entertain the plaintiff's claim for the following reasons:

i. the plaintiff has failed to comply with the terms, conditions and exceptions of the 1999 policy; and

ii. the plaintiff's claim, if any, arose in June and/or August 2002;

A (c) In the circumstance, the 3rd defendant pleads that the plaintiff has no cause of action against the 3rd defendant.

[13] The primary issue to be determined is whether the 1st defendant or the 3rd defendant is liable or none at all. Flowing B from that answer is the question of quantum of indemnity that the plaintiff is entitled to receive, if at all. In order to determine the primary issue, this court needs to determine the following related issues:

C (a) Whether the PII scheme is a "claims made" policy and if so, what in essence is a "claims made" policy?

(b) If the PII scheme is a "claims made" policy then whether general conditions in cls. 5.1.1, 5.1.2 and 5.1.3 of the respective policy relating to notification of a claim to D Cunningham or Crawford (as the case may be) in respect of the circumstances spelt out by the said clauses is a condition precedent for making the claim?

(c) Whether oral notification given by the plaintiff in August E 1999 is sufficient or must it be in writing as prescribed by cl. 5.2?

(d) What is the effect of the saving provision contained in cl. 7.2 in respect of non-compliance of cl. 5.2 by the plaintiff?

F (e) Whether by its conduct the 3rd defendant has waived the condition requiring written notice and thus estopped from setting up the defence of non-notification in writing?

(f) Whether cl. 6.2(b) excludes the 1st defendant's liability?

G **[14]** A good starting point would be to look at the relevant clauses in the insurance policy. Clause 4, which is similar in all three policies, is the insuring clause and the relevant portion reads:

4. Insuring Clauses

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4.1. On the terms and conditions herein contained and in consideration of the Premium the Insurers shall indemnify the Insured against any Claim first made against any or all of them during the Period of Insurance in respect of any civil liability incurred in the course of the conduct of I the Profession by the Practice.

...

...

> 4.4. All claims first made or deemed to have been first made against all or any of the Insured in one or more Periods of insurance arising from one act or omission or series of acts or omissions attributable to the same underlying cause or event shall be regarded as ''One Claim''. All claims arising out of Misconduct of one person acting alone or in collusion with others shall be regarded as attributable to one underlying cause and accordingly deemed to constitute ''One Claim''.

[15] It is common ground between the 1st and 3rd defendants that the PII is a "claims made" policy. As to what this means, Lord Justice Rix's decision in the English Court of Appeal case of *HLB Kidsons & Ors v. Lloyd's Underwriters* [2009] 1 Lloyd's LR 8 involving a similar contest about notification of a claim arising out of a professional indemnity insurance policy is most informative. Lord Justice Rix, at p. 11 of the report has this to say:

> The essence of a "claims made" policy is that it provides cover for a claim first brought against the assured during the policy year. As is common with such policies, however, it extends cover to claims first brought against the assured after the policy year provided such claims arise out of circumstances previously notified to the insurers of which the assured became aware during the policy year. The rationale of such policies has been described in *J Rothschild Assurance plc v. Collyear* [1999] 1 Lloyd's Rep IR 6 at page 22 and in *Friends Provident Life and Pensions Ltd v. Sirius International Insurance Corporation* [2005] Lloyd's Rep IR 135 at page 142.

[16] Further in *Quinn Direct Insurance Ltd v. Law Society of England and Wales* [2010] EWCA Civ 805, also involving a professional indemnity insurance scheme, the English Court of Appeal applied *HLB Kidsons* (*supra*) and described succinctly the meaning of a "claim made" policy in the following words:

> Both are a type of insurance known as a "claim made" policy, that is to say that the risk insured is that for which a claim is made in the period of insurance whenever the damage or its cause arose as explained by Rix J in *J Rothschild Assurance plc v. Collyear* [1999] 1 Lloyd's Rep IR 6 and Rix LJ in *HLB Kidsons & Ors v. Lloyd's Underwriters Subscribing to Policy 621/PKID001001 and others* [2009] 1 Lloyd's LR 8. Thus both at the inception of the policy and in the period of its operation, the firm must notify the insurer of relevant circumstances, the extent of which may vary according to the terms of the policy. There is no exception to the obligation of disclosure in the case of information subject to a privilege

A enjoyed by the firm as opposed to its client (see *March Cabaret Club & Casino Ltd v. The London Assurance* [1975] 2 LI.L.R 169, 177).

[17] In evidence, DW1, DW2 and DW3 had all confirmed that the PII scheme is a "claims made" policy. In this regard DW2 had this to say:

> ... the policy is triggered when a claim is made against the insured whether by way of a legal suit or whilst during the period of insurance, the insured becomes aware that a potential claim which may form the subject of indemnity will be made against them and the insured makes a written notice to the scheme manager. Even if a suit is not filed against the insured then but perhaps a few years later, the policy will recognize the claim as a claim made in the year when the written notice was made.

[18] In fact the Court of Appeal in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* [2010] 4 CLJ 770 had held that the PII policy is a "claims made" policy. In the premise, the PII policy operates to indemnify the insured "against any claim first made" against the insured as stipulated in cl. 4 of the policy. Therefore, the determination of when a claim is first made is important to ascertain which policy is at risk. In this regard it would be pertinent to look at the general conditions contained in cl. 5 of the policy, which reads as follows:

> 5. General Conditions
>
> 5.1.1. The practice shall ensure that Notice is given as soon as practicable of any claim made against the insured during the Period of Insurance which may form the subject of indemnity under this Insurance or of the receipt of any intimation of an intention to make a claim against the Insured
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> 5.1.2. Notice shall also be given of any matter event or circumstance of which the insured shall become aware during the Period of Insurance and which may reasonably be expected to give rise to a claim against the Insured
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> 5.1.3. Any claim arising from any matter event or circumstance of which Notice has been given in accordance with General Condition 5.1.1 or 5.1.2 shall be regarded as claim first made during the Period of Insurance in which such Notice was given.

5.2. Notice in terms of General Conditions 5.1 shall be given in writing or by Tested Telex or Tested Facsimile to: A

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[19] The Court of Appeal in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) had occasion to consider the workings of cl. 5 above in order to determine when a claim is made and which policy would be at risk. In the majority decision of the Court of Appeal, it was held as follows: B C

> A perusal of both General Conditions 5.1.1 and 5.1.2 of the policy of indemnity is now pertinent. The result is this - that the question arising from this is at which point in time should notice be given to the insurers of a "matter, event or circumstance ... which may reasonably be expected to give rise to a claim against the insured?" D
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> Various time frames were postulated as to which date constitutes the "matter, event or circumstances" which may give rise to a claim against the insurers by the appellant. E
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> ...
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> The sum of it is that, the arbitrator had given his interpretation of General Conditions 5.1.1 and 5.2.1. The arbitrator's view is that notice under Condition 5.1.2 is for potential claim, whereas Condition 5.1.1 relates to actual claim. As for Condition 5.1.3 the arbitrator construed it to be for a situation where only one notice has been given, but that it is silent in a situation where both notices are given for the purpose of determining under which policy the indemnity is payable. The arbitrator construed Condition 5.1.3 as a deeming provision, which provides an alternative where a notice has been given in accordance with either 5.1.1 or 5.1.2 falling under the period of insurance of which such notice was given. F G
>
> Thus we see no "misconduct" on the part of the arbitrator in the light of what followed next in his construction of the said General Condition. The arbitrator stated that in view of the alternative given, and where the insured had given both notices, indemnity should be payable under the second notice under Condition 5.1.1 when the potential claim under Condition 5.1.2 has crystallised into an actual claim. H I
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> Thus in a situation where the claimants have given one or both notifications, the importance of determining under which of the three policies indemnity is payable cannot be understated.

A The arbitrator viewed Condition 5 in its entirety and decided that 5.1.3 inclined heavily towards the conclusion that the policies on this appeal are "claims made" rather the "occurrence-based". We agree with the arbitrator.

B **[20]** Therefore, in the majority decision, two aspects of its ratio are of immediate importance. The first is that the PII policy is a "claims made policy". The second is that notification of claim is divided into two categories, namely:

i. actual notice of claim under cl. 5.1.1.; and

C

ii. potential notice of claim or circumstances giving rise to a claim under cl. 5.1.2.

In the majority judgment, Tengku Baharudin Shah JCA and Zainun Ali JCA held that when the claimant had given both
D potential and actual notice, then the notice of actual claim being the later, and that which crystallizes the potential to actual, would trigger the policy existing at the time of the actual notice and put that policy at risk. Accordingly, in that case by a majority it was held that the last of the three policies would be at risk for it was
E then that notice of actual claim was made. However, the minority dissenting view of Zaleha Zahari JCA was diametrically opposed to that of the majority. The minority view was that the first notification of a potential claim would trigger the policy to be at risk for the deeming provision under cl. 5.1.3 would kick in and
F accordingly the court held that the first policy was at risk. This view seems to be in accord with the English decisions referred to above.

[21] I am mindful of the fact that, I am bound by the majority
G decision of the Court of Appeal in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*). That would mean that even if the plaintiff's oral notification of potential claim to Cunningham in 1999 is valid under cl. 5.1.2, then the plaintiff's notification of actual claim in 2002 under cl.
H 5.1.1 would crystallize the claim and it is this second notice that sets off the then existing policy to be at risk. It is therefore abundantly clear that the requirement of notice under cl. 5.1.1 or 5.1.2 is a condition precedent for a "claims made" policy for it is the relevant notice that would trigger off the policy at risk.

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[22] So, it now turns to me to decide if the oral notification in 1999 is valid. The 3rd defendant admits that the plaintiff had given oral notification of the claim in 1999. However, counsel for the 3rd defendant submits that cl. 5.2 clearly provides that notice

under cls. 5.1.1 and 5.1.2 shall be in writing. Counsel further submits that since notice is a condition precedent to the liability of an insurer, the condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy (see the cases of *Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors* [2004] 8 CLJ 538 at 553; and *Jupiter Securities Sdn Bhd v. American Home Assurance Company* [2008] 9 CLJ 131 at 134, 135 and 139). This is the general law. However, as held by Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 at 141:

> ... every judgment must be read as applicable to the particular facts proved ... since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found ... a case is only an authority for what it actually decides.

[23] There is a peculiar term in the Malaysian Bar's PII policy as found in clause which reads:

> 7.2. Breach of Conditions Of This Insurance
>
> Save in the case of non-payment of the Premium but subject to General Conditions 5.3 and 5.10 the Insurers will not seek to resile from this contract or to avoid any claim on the grounds of breach of or non-compliance with the terms and conditions of this insurance.
>
> Provided That
>
> 1. any person seeking indemnity hereunder shall establish on a reasonable balance of probability that the breach or non-compliance was not attributable to Misconduct on his/her part
>
> 2. where the breach or non-compliance has resulted in material prejudice to the investigation and/or defence of any claim the Insurers' liability for Damages and Defence Costs may be reduced by the amount of the prejudice sustained
>
> 3. in the event of a difference between the Insured and the Insurers regarding the existence of prejudice and/or the cost thereof General Conditions 5.9 shall apply.

[24] I say that cl. 7.2 is peculiar because, one would not ordinarily find such clauses in insurance contracts. There must be purpose for which cl. 7.2 was inserted in the contract. This clause clearly states that mere breaches of the terms and conditions of

the policy other than non-payment of premium and subject to cls. 5.3 and 5.10, cannot be relied on by the insurer, and in this case the 1st and/or 3rd defendants, to resile from the contract or avoid liability. Therefore, the 3rd defendant cannot avoid liability by merely claiming that the oral notification in 1999 is a breach of cl. 5.2. Even if the breach or non-compliance had resulted in material prejudice to the investigation and/or defence of any claim, the 3rd defendant cannot avoid liability altogether but merely seek to reduce the amount of damages payable. The argument that terms and conditions in insurance contracts are to be strictly construed must work both ways. If the insurer had entered into a bargain where the insurer had agreed to not set up technical defences to avoid claims, then such bargain must be given effect and the insurer must be held to its bargain.

[25] I agree with submissions of counsel for 1st defendant that oral notification given in 1999 had not caused any prejudice to the 3rd defendant. As stated in the proviso to cl. 7.2 it is incumbent on the 3rd defendant to prove by evidence that as a result of the misconduct on the part of the plaintiff material prejudice to the investigation had been occasioned by the oral notification. However, the 3rd defendant did not adduce any evidence in this regard.

[26] Notice is a procedural step, the object of which is to alert insurers to investigate the claim before the trail becomes cold. This is not the case here. The 3rd defendant had ample opportunity to investigate the claim to ascertain if it was a false or fraudulent claim. In any event, the 3rd defendant had not raised the issue of breach of cl. 5.2 in any of the correspondence with the plaintiff. In fact, save for the pleadings as contained in its defence, the 3rd defendant had not previously raised this issue at all. Nor has the 3rd defendant repudiated the claim. Nor has it notified the plaintiff whether the claim is accepted or rejected. The last correspondence from Cunningham informed the plaintiff that the plaintiff's claim had been submitted to the London Underwriters for their consideration. Why should the insurer submit the plaintiff's claim to the London Underwriters unless it had accepted the plaintiff's claim for processing?

[27] Clearly, this inordinate delay on the part of the 3rd defendant in replying to the plaintiff and subsequently raising the technical defence of oral notification in breach of the letter and spirit of cl. 7.2 speaks volumes about the 3rd defendant's conduct. The 3rd defendant's defence is merely an afterthought. In this regard, I agree that the 3rd defendant must be estopped from

unfairly denying liability to the plaintiff. In the premise, I find that the plaintiff's oral notification in 1999 is on the facts sufficient and not prejudicial to the 3rd defendant. That oral notification suffices for the purpose of notice under cl. 5.1.2.

[28] Now, having said that, what about the majority decision in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) where it was held that when both potential and actual notification is given then it is the notice of actual claim and not potential claim that triggers the policy to be at risk. On the surface, there seems to be:

(a) an oral notification in 1999 to Cunningham;

(b) a written notification to the 1st defendant in the 2002 insurance submission form;

(c) a written notification on 5 September 2002 to Crawford of the actual claim after the plaintiff was served with the writ of summons in Civil Suit No. 22-145-2002 (bundle B p. 2); and

(d) a written notification of the actual claim on 18 October 2002 to Cunningham enclosing copies of both writ of summons in Civil Suit No. 22-145-2002 and Civil Suit No. 22-459-2002 (bundle B p. 37).

Applying the ratio in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) would mean that it is the notification of actual claim in 2002 that would crystallize the claim putting the 2002 policy at risk. This would mean that it is the 1st defendant and not the 3rd defendant who would have to indemnify the plaintiff. I invited both counsel to make further submissions on this point as there were factual variance between that case and the present case.

[29] Counsel for the 1st defendant argues that the ratio in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) is not applicable to the present case. The reasoning is that the 1st defendant's defence is that the plaintiff's claim was excluded by cl. 6.2(b) which reads as follows:

> The indemnity in terms of this insurance specifically excludes any circumstance or occurrence known to the Insured prior to the Insured effecting cover under the Master Policy which might reasonably be expected to produce a claim.

[30] Now, the plaintiff very well knew of the possibility of claims arising from the 1999 misappropriation of moneys by the clerk. Therefore, by virtue of cl. 6.2(b) the claims arising from that circumstance is specifically excluded from the 2002 policy. This is akin to the exclusion of pre-existing conditions in a medical insurance contract. Counsel for 1st defendant submits that the majority decision in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) was confined to the interpretation of cls. 5.1.1, 5.1.2 and 5.1.3. That case did not touch on cl. 6.2(b) at all. Now, the words in cl. 6.2(b) are very clear and unambiguous. For the circumstances to fall within the exclusion in cl. 6.2(b):

(i) the insured must have become aware of the circumstances during the period of insurance;

(ii) the circumstances must be such as to be capable of giving rise to a claim; and

(iii) the knowledge or awareness of the assured must encompass not only the circumstances, ie, the factual matters in question, but their potential to give rise to a claim.

[31] It is common ground that the plaintiff was in August 1999 aware of the circumstances or occurrence which might reasonably be expected to produce a claim. The plaintiff in fact had given oral notification of that circumstance to the 3rd defendant via Cunningham. Again the plaintiff notified the 1st defendant of the possible claim in the insurance proposal form for the 2002 policy.

[32] The 1st defendant's counsel further submits that cl. 6.2(b) exclusion applies so long as the insured was aware of the circumstances or the occurrence prior to the 1st defendant giving cover, whether or not notification is given to the insurer. This means that the insured runs the risk of losing cover if he is aware of the circumstances or occurrence but fails to give notice to the prior insurers under cl. 5.1.2. Though that is not the case here for the plaintiff had given notice of the potential claim to the 3rd defendant in 1999. Counsel for the 1st defendant further argues that the Court of Appeal in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) never dealt with this point.

[33] The case for the 1st defendant is that the claim is excluded from cover under the 2002 policy pursuant to cl. 6.2(b) and that it had repudiated liability. Therefore, the issue of notice to trigger off liability under the 2002 policy does not arise. The notice of

claim given to Crawford in 2002 is redundant. Counsel therefore, argues that, to that extent *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) is distinguishable from the facts of the present case.

[34] Counsel for the 3rd defendant agrees with the above submissions and concedes that the 1st defendant is not liable by virtue of the exclusion in cl. 6.2(b). If that is so than the ratio in *Tetuan Bakar & Partners v. Malaysian National Insurance Bhd & Ors and Another Appeal* (*supra*) does not apply to our case. This is because the claim is specifically excluded from the 2002 policy cover and the question of the 2002 written notification to Crawford crystallizing the claim under the 2002 policy does not arise. The notice of actual claim given to Cunningham as agents of the 3rd defendant on 18 October 2002 enclosing the two writs of summons relates back to the earlier oral notification. This is evident from the contents of that letter of 18 October 2002, in particular paras. 2 and 3, which reads:

> We have been served, in June and August 2002, with the abovementioned Writ Saman and had referred the said claims to Messrs Crawford & Co but are now advised instead to refer the claims to you.
>
> You were notified in August 1999 by our Mr Gooi Hock Seng about the possibility of the said claims, whereafter you faxed us a Claims Notification Guidelines on 20.8.1999.

In the circumstance, when the letter of 18 October 2002 was sent the notification then subsisting was the oral notification in 1999. That oral notification for reasons stated earlier is sufficient and valid. Therefore, the written notification on 18 October 2002 can only be taken as crystallizing the potential claim notified in 1999 under the 1999 policy. In the premise, I find that the 1999 policy is at risk and the 3rd defendant is liable to indemnify the plaintiff pursuant to cl. 4 read with cl. 5.1.3.

[35] Now I turn to the issue of quantum of indemnity the plaintiff is entitled to receive. The plaintiff has shown that there are two claims made by former clients arising from the misappropriation of moneys by the clerk in 1999. In respect of Civil Suit No. 22-145-2002, judgment has been given against the plaintiff. Therefore, in respect of this claim, the 3rd defendant would have to indemnify the plaintiff to the extent of the plaintiff's liability under that judgment as well as plaintiffs legal cost subject of course to the terms and conditions of the policy including excess and other deductibles provided in the policy.

[36] In respect of the other claim in Civil Suit No. 22-459-2002 it is still pending adjudication in the Penang High Court. Counsel for the 3rd defendant argues that since the quantum of indemnity payable cannot be determined until the suit is decided there cannot be any order respecting this suit. That is not a valid argument. This court is no longer bound by the rigid forms of action. The rule now is to mould the remedy to suit the rights of the parties before the court - *ubi jus ibi remedium*. A declaratory order at this stage will serve the ends of justice.

[37] I also find the 3rd defendant's conduct in the matter to be most unbecoming. They seem to have taken a lackadaisical attitude to the plaintiff's predicament. The total lack of etiquette in not replying correspondence even after reminders are sent cannot be countenanced. The mandatory PII scheme was introduced by Parliament for the purpose of meeting the claims of lawyers' clients who had become victims of negligence or fraud. Advocates and solicitors are also protected from financial ruin by the indemnity under the scheme. The plaintiffs had paid their premiums. They are entitled to prompt service and response from the insurers. This was not forthcoming from the 3rd defendant. The fact that the 3rd defendant was no longer the insurer in the year 2002 seems to have had some part to play in the 3rd defendant's total lack of interest. The 3rd defendant's reliance on a technical defence when such defences are excluded under cl. 7.2 shows the 3rd defendant's utter disregard of its contractual responsibilities. The plaintiff was left on their own to defend the suit. That they were advocates and solicitors made that a little easier. I dread to think of the consequence if the plaintiff was a lay person. In this regard, I am of the view that plaintiff ought to be awarded general damages in the sum of RM30,000 for the 3rd defendant's breach of contract.

[38] Wherefore, I make the following orders:

(a) that in respect of the Penang High Court Civil Suit No. 22-145-2002 the 3rd defendant shall indemnify the plaintiff to the extent of the plaintiff's liability under the judgment in that suit together with the plaintiff's legal cost incurred in that suit subject to the terms and conditions of the policy in respect of excess and other deductibles provided in the Certificate of Insurance No. MT 99-01374 (Master Policy No: DPI-43900362-01) for the period 1 July 1999 to 31 December 2000 issued by the 3rd defendant.

(b) that in respect of the Penang High Court Civil Suit No. 22-459-2002 the 3rd defendant shall indemnify the plaintiff to the extent of the plaintiff's liability that may arise under any judgment or order to be made by the Penang High Court in that suit together with the plaintiff's legal cost incurred in that suit subject to the terms and conditions of the policy in respect of excess and other deductibles provided in the Certificate of Insurance No. MT 99-01374 (Master Policy No: DPI-43900362-01) for the period 1 July 1999 to 31 December 2000 issued by the 3rd defendant;

(c) that the Senior Assistant Registrar do assess the quantum of indemnity payable by the 3rd defendant pursuant to paras. 38(a) and (b) above;

(d) that the 3rd defendant pays the sum of RM30,000 as general damages to the plaintiff;

(e) the 3rd defendant pay interest at the rate of 8% on the judgment sum from the date of this judgment till date of full settlement;

(f) the plaintiff's and the 1st defendant's cost of this action is to be borne by the 3rd defendant.